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No. 82-316

In the Supreme Court of the United States

OCTOBER TERM, 1982

A.V. COSTANTINI, dba UNITED TRAVEL SERVICE, dba WARDS TRAVEL SERVICE, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the Civil Aeronautics Board did not abuse its discretion in dismissing petitioner's complaints alleging violations of the Federal Aviation Act.

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A-1 to A-4) is unpublished. See 679 F.2d 896. The opinion of the Civil Aeronautics Board (Order 80-11-10; Pet. App. C-1 to C-6) and the opinion of the Director of the Board's Bureau of Consumer Protection (Order 80-6-21; Pet. App. D-1 to D-5) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1982. A petition for rehearing was denied on May 25, 1982 (Pet. App. B-1). The petition for a writ of certiorari was filed on August 23, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 411 of the Federal Aviation Act, 49 U.S.C. 1381, provides:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

STATEMENT

This action arises from three complaints that petitioner filed in May 1980 with the Civil Aeronautics Board under Section 411 of the Federal Aviation Act, 49 U.S.C. 1381. In his complaints, petitioner requested that the Board institute enforcement proceedings against Trans World Airlines (TWA) and against two airline trade associations, the Air Traffic Conference (ATC) and the International Air Transport Association (IATA). Petitioner contended that in 1973 TWA, ATC, and IATA unlawfully frustrated his plan for continuation and expansion of his former travel agency business. Specifically, he argued that TWA falsely had stated that petitioner was engaged in a franchise operation barred by ATC and IATA rules and that ATC and IATA had misrepresented the reasons for their refusal to accredit his branch offices. Petitioner previously had filed numerous complaints with the Board alleging interference with his

business by the air carrier industry and also had filed several federal district court actions as well as an arbitration proceeding. See Pet. App. D-2 n.1, D-3 to D-4 n.2.

The Director of the Bureau of Consumer Protection, acting under delegated authority, dismissed petitioner's complaints on the ground that the public interest would not be served by an investigation of the complaints (Pet. App. D-1 to D-5). The Director noted that petitioner's complaints represented merely a continuation of a long-standing private dispute, which the Board previously had indicated should be pursued through arbitration proceedings or the courts, and that petitioner had presented his claims in court and had lost. The Director also concluded (*id.* at D-3 to D-4) that:

> the public interest would not be served by expending our scarce enforcement resources now to pursue allegations about incidents allegedly occurring seven years ago, especially in view of the major changes that have been made in the regulatory framework under which the Board operates and the fact that the branch office appointment procedures of ATC and IATA are under review in the on-going investigation into the competitive marketing of air transportation in Docket 36595.

The Board affirmed the Director's dismissal of petitioner's complaints (Pet. App. C-1 to C-6). The Board concluded that, even if the complaints were not considered to involve a purely private dispute, dismissal was justified for the other reasons cited by the Director (*id.* at C-4 to C-5).

The court of appeals affirmed the Board's decision (Pet. App. A-1 to A-4). The court concluded that the Board did not abuse its discretion in dismissing the complaints, since it had based its public interest determination on appropriate criteria—(1) the essentially private nature of petitioner's disputes, (2) the fact that the disputes had been the subject

of several prior judicial and administrative proceedings that had proved to be fruitless, and (3) the existence of the Board's ongoing review of competitive marketing practices. The court rejected petitioner's contentions of Board errors, characterizing them as "without foundation" (*id.* at A-4).

ARGUMENT

The petition in this case raises matters that are entrusted by statute to the discretion of the Civil Aeronautics Board. The decision of the court of appeals upholding the Board's dismissal of petitioner's complaints is correct and does not conflict with any decision of this Court or any court of appeals. Therefore, it does not warrant review by this Court.

1. The court of appeals correctly concluded that the Board did not abuse its discretion in dismissing petitioner's complaints. Section 411 of the Federal Aviation Act, the statutory provision under which petitioner filed his complaints, states that the Board "may" initiate an investigation into alleged unfair or deceptive practices "if it considers that such action by it would be in the interest of the public." 49 U.S.C. 1381. It is well established that the Board must find that an investigation would be in the public interest in order to proceed under Section 411. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 302 (1976); *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 85 (1956); *Aloha Airlines, Inc.* v. *CAB*, 598 F.2d 250, 256 (D.C. Cir. 1979). The Board has no jurisdiction under Section 411 to "vindicate private rights." *American Airlines* v. *North American Airlines, Inc., supra*, 351 U.S. at 83. A court's duty in reviewing the Board's public interest determination is not to determine independently what constitutes the public interest, but rather to decide "whether, in determining what is the public interest, the Board has stayed within its jurisdiction and applied criteria appropriate to that determination." *Id.* at 85.

As the court of appeals found (Pet. App. A-3), the criteria applied by the Board in this case were "entirely appropriate" to the public interest determination. The criteria—the essentially private nature of the dispute, the existence of prior judicial and administrative proceedings relating to the same dispute that had been resolved against petitioner, the Board's limited enforcement resources, the fact that the incidents at issue had occurred seven years earlier under a different regulatory framework, and the existence of the Board's ongoing review of competitive marketing practices, including practices of ATC and IATA — all point to a lack of public interest in initiating a Board investigation. Petitioner has not disputed the court of appeals' conclusion that the criteria used by the Board were appropriate and has not presented any additional considerations that would justify overruling the Board's public interest determination. The court of appeals correctly concluded that the Board did not abuse its discretion in dismissing petitioner's complaints.[1]

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[1]See, *e.g.*, *REA Express, Inc.* v. *CAB*, 507 F.2d 42, 46 (2d Cir. 1974), noting that the Board should assume jurisdiction under Section 411 only in those cases in which injury to the public is substantial.

Petitioner argues (Pet. 19-20) that the Board and the court of appeals should not have focused on Section 411, since he alleges that his complaints are authorized under 49 U.S.C. 1482(a) as well. However, the latter section also gives the Board discretion to dismiss complaints for reasons of public interest other than failure to allege facts constituting a violation of the Federal Aviation Act. See *Flight Engineers' International Association* v. *CAB*, 332 F.2d 312, 314-315 (D.C. Cir. 1964). Reasons that may justify dismissal under 49 U.S.C. 1482(a) include availability of relief in another forum, such as a court. 332 F. 2d at 316-317. Cf. also, *e.g.*, *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958) (an administrative agency must have discretion "to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically").

2. Petitioner contends that the decisions below conflict with various established principles found in statutes or in decisions of this Court. None of these contentions is valid, and the court of appeals properly rejected them (Pet. App. A-3 to A-4). First, petitioner argues (Pet. 12) that the decisions below conflict with the principle that agency orders must be obeyed, citing 49 U.S.C. 1485(e) and *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301 (1935). This principle has no relevance here because the Board decided on public interest grounds not to investigate petitioner's allegations that agency orders had been violated. It is that exercise of the Board's discretion that is at issue here, not the merits of petitioner's complaints. Second, petitioner contends (Pet. 13-16) that the court of appeals failed to recognize that petitioner has a "right to administrative action" as a representative of the public interest, citing, *inter alia*, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). There is no such right to administrative action in petitioner's case, since the statute requires that the Board (not petitioner) make the public interest finding that will justify initiation of an investigation. Neither *Sierra Club* nor the other authority cited by petitioner provides for any "right to administrative action" under Section 411 or any other section of the Federal Aviation Act. Moreover, as noted above, petitioner has not demonstrated that investigation of his complaint would be in the public interest. Third, petitioner argues (Pet. 16) that the court of appeals has decided an important question of federal law relating to the legality of TWA's alleged acts under 49 U.S.C. 1472(e). Neither the Board nor the court of appeals considered any such question or made any finding of fact concerning TWA's alleged acts. It would be inappropriate for this Court to address petitioner's argument at this stage. See, *e.g.*, *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 283 (1978) (Powell, J.).

Petitioner argues next (Pet. 17-18) that the decisions below conflict with the principle that agency action must conform to the agency's rules, citing *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), and other cases. There has been no violation of any agency rule in this case. Although petitioner claims that the Board's rules (14 C.F.R. 302.207(b) and 302.208) require it to accept and act on uncontroverted allegations of fact, the provisions cited by petitioner are for the administrative convenience of the Board. They do not require the Board to accept any uncontroverted allegation of fact made by a third party. Moreover, 14 C.F.R. 302.208 states on its face that the Board may proceed "in its discretion."

Petitioner next contends (Pet. 19-21) that the decisions below conflict with the principle that an evidentiary hearing is required, citing 49 U.S.C. 1482 and *Marshall* v. *Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966), cert. denied, 385 U.S. 1006 (1967). But 49 U.S.C. 1482 requires the Board to investigate a complaint only when there is "reasonable ground" for such investigation; moreover, petitioner fails to quote the portion of that statute that provides that "[w]henever * * * the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing." 49 U.S.C. 1482(a). See also page 5, note 1, *supra*. Moreover, an evidentiary hearing is intended to benefit the person accused, not the complainant. *Marshall* v. *Sawyer* is inapposite, because the Board never made a determination of adjudicatory facts in this case.[2]

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[2]Petitioner also cites 5 U.S.C. 554(c)(2) as authority for requiring an evidentiary hearing in this case. That section applies only to adjudications required by statute to be determined on the record after opportunity for a hearing. 5 U.S.C. 554(a). Here the statute at issue gives the

Petitioner argues (Pet. 21-22) that the decisions below conflict with the principle that an order issued without evidentiary support is beyond the power and jurisdiction of an agency, citing *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931). Since the Board did not rule on the merits of petitioner's complaint, there was no need for it to consider his evidence except as it related to the public interest determination. Petitioner does not dispute that the Board had evidentiary support for its decision that an investigation of petitioner's complaint would not be in the public interest.

Petitioner contends finally (Pet. 22-23) that the court of appeals' decision conflicts with the principle that trial de novo is available when agency action is unwarranted by the facts, citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). In *Overton Park* this Court noted that de novo review under 5 U.S.C. 706(2)(F) is authorized only when agency action is adjudicatory in nature and agency factfinding procedures are inadequate, or when issues not before the agency are raised in a proceeding to enforce nonadjudicatory agency action. 401 U.S. at 415. The second situation referred to in *Overton Park* is clearly inapplicable. The first also has no relevance, since there is no allegation that the Board erred in finding the facts that support its determination that investigation of petitioner's complaint would not be in the public interest.

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agency the discretion to determine on public interest grounds that no adjudication shall occur, and the Board exercised that discretion. Thus 5 U.S.C. 554(c)(2) has no application to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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